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IN THE

Supreme Court of the United States

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,

APR 6 2001

v.

GULF POWER COMPANY, *et al.*,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES OF AMERICA,
Petitioners,

v.

GULF POWER COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE UNITED STATES TELECOM ASSOCIATION AND VERIZON COMMUNICATIONS AS *AMICI CURIAE* IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

This brief addresses the question whether the Pole Attachment Act, 47 U.S.C. § 224, applies to attachments by cable operators used to provide both traditional cable television programming and high-speed Internet access.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICI CURIAE*	1
STATEMENT	2
SUMMARY OF ARGUMENT	6
ARGUMENT	8
SECTION 224 APPLIES TO REGULATE THE RATE THAT CABLE OPERATORS MUST PAY FOR ATTACHMENTS USED TO PROVIDE BOTH TRADITIONAL CABLE SERVICE AND HIGH-SPEED INTERNET ACCESS	8
A. Section 224(e) Applies Whenever An Attachment Is Used To Provide Telecommunications Services, Regardless Of What Other Services It Is Used To Provide	10
B. Cable-Delivered High-Speed Internet Access Includes The Provision Of A Telecommunications Service	16
CONCLUSION	25

TABLE OF AUTHORITIES

Cases — Page

AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000) 17, 19, 21, 23

National Cable Television Ass'n v. FCC, 33 F.3d 66 (D.C. Cir. 1994) 21-22

Texas Utils. Elec. Co. v. FCC, 997 F.2d 925 (D.C. Cir. 1993) 9, 11

Statutes

Telecommunications Act of 1996, § 706, 110 Stat. 153 (reprinted in note to 47 U.S.C. § 157) 18

47 U.S.C. § 153(7) 11, 16, 19

§ 153(20) 16, 23

§ 153(43) 16

§ 153(44) 10

§ 153(46) 16, 18

§ 224 ..... *passim*

§ 522(6) 19, 21

§ 522(7) 11

§ 522(14) 20

§ 522(20) 20

§ 541(b) 11, 16

Legislative History

141 Cong. Rec. H8425 (Aug. 4, 1995) 12

141 Cong. Rec. H9963 (Oct. 12, 1995) 13

H.R. Conf. Rep. 104-458, 104th Cong., 2d Sess. (1996) 13, 15, 22

H.R. Rep. No. 104-204, Part I, 104th Cong., 1st Sess. (1995) 12, 15

H.R. Rep. No. 98-934, 98th Cong., 2d Sess. (1984) 21

S. Rep. No. 104-23, 104th Cong., 1st Sess. (1995) 13

TABLE OF AUTHORITIES—Continued

Administrative Materials	Page
In re Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, Memorandum Opinion and Order, CC Docket No. 99-295, 15 FCC Rcd 3953 (Dec. 22, 1999), *aff'd, AT&T Corp. v. FCC*, 220 F.3d 607 (D.C Cir. 2000)	5
In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, Order on Remand, CC Docket No. 98-147, 15 FCC Rcd 385 (Dec. 23, 1999)	17
In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order, CC Docket No. 98-147, 13 FCC Rcd 24,012 (Aug. 7, 1998)	17, 23
In re Federal-State Joint Board on Universal Service, Report to Congress, CC Docket No. 96-45, 13 FCC Rcd 11,830 (Apr. 10, 1998)	16, 18, 22
In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans, Second Report, CC Docket No. 98-146 (Aug. 21, 2000)	2-3, 4, 18
In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans, Report, CC Docket No. 98-146, 14 FCC Rcd 2398 (Feb. 2, 1999)	3
In re Internet Ventures, Inc., Memorandum Opinion and Order, File No. CSR-5407-L, 15 FCC Rcd 3247 (Feb. 18, 2000)	20

TABLE OF AUTHORITIES—Continued

Other Materials — Page

Comments of the National Cable Television Association to the FCC, *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Gen. Docket No. 00-185 (filed Dec. 1, 2000) 5, 17

Brief of the FCC as *Amicus Curiae*, *AT&T Corp. v. City of Portland*, 2000 U.S. App. Lexis 14383 (9th Cir., filed Aug. 16, 1999) 18

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INTEREST OF *AMICI CURIAE*[1]

The United States Telecom Association (USTA) is a trade association representing more than 1,200 companies that

[1] Letters from the parties consenting to the filing of this brief have been lodged with the Clerk. *Amici* state that no person other than *amici*, their members, and their counsel authored the brief in whole or in part or made a monetary contribution to its preparation or submission.

provide telephone and Internet services, among other products and services. Verizon Communications, a corporation formed by the merger of Bell Atlantic and GTE, is the nation's largest local telephone company, a provider of high-speed connections used for Internet access, and a provider of Internet access services. USTA's members, including Verizon, own a substantial number of utility poles, ducts, conduits, and rights of way to which cable operators make attachments to provide traditional cable services and high-speed connections used for Internet access. Many of USTA's members, including Verizon, provide high-speed Internet access over their own telecommunications facilities (which are attached to poles, ducts, conduits, and rights of way) in direct competition with cable operators (which attach their wires to the same poles, ducts, conduits, and rights of way). *Amici* have an interest in ensuring that cable operators pay proper rates under the Pole Attachment Act, 47 U.S.C. § 224 [hereafter cited simply as "Section 224"]. More particularly, *amici* have an interest in seeing that cable operators are treated, under the Pole Attachment Act, the same as their telecommunications-services rivals when competing for customers seeking high-speed connections for Internet access. This brief addresses only the first question presented for review, concerning cable systems; it does not address the question concerning attachments by providers of wireless telecommunications services.

STATEMENT

The pertinent facts about the "high-speed Internet access" that is the topic of the first question presented are straightforward. Basic descriptions of the ways in which cable companies and telephone companies supply high-speed connections for Internet access may be found in two reports of the Federal Communications Commission (FCC or Commission): *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*,

Second Report, CC Docket No. 98-146, at ¶¶ 28-40 (Aug. 21, 2000) ["*Second Advanced Services Report*"]; *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, Report, CC Docket No. 98-146, 14 FCC Rcd 2398, at ¶¶ 34-61 (Feb. 2, 1999).

To reach the Internet, residential customers must establish two physical communications connections. *First*, they must establish a connection between their homes and the facilities of an Internet service provider (ISP). Customers purchasing traditional low-speed or "narrowband" Internet service commonly rely on their telephone lines to make this connection, using modems in their computers to dial in to another bank of modems hosted by their ISP.[2] This bank of modems is known as an ISP's "point of presence." *Second*, customers must obtain service from an ISP, such as America Online or Verizon Online or Earthlink or Microsoft Network, to establish a connection between the local ISP point of presence and the routers and other facilities that, connecting to other ISPs and end users, make up the Internet. Although some ISPs offer customers additional services—for example, access to unique content, private e-mail accounts, chat rooms, instant messaging, search tools, and the like—the essential function of the ISP is to offer a connection from their points of presence to the Internet.

A growing number of consumers are seeking to connect to the Internet at higher speeds than those available through traditional dial-up services. Such customers likewise require two physical connections to reach the Internet: a connection between their homes and an ISP's point of presence, and a

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[2] The term "narrowband" is used to indicate that a relatively narrow range of frequencies is used for the communication. One way of increasing transmission speed, *i.e.*, the amount of information conveyed per second, is by increasing the range of frequencies in use, or broadening the band. "Broadband," therefore, is used to refer to high-speed transmissions.

connection between that point of presence and the Internet. The high-speed connections are commonly referred to as "broadband." *See* note 2, *supra*. Today, cable operators using their coaxial cable and fiber optic facilities, and not local telephone companies using the traditional copper loop, are the dominant providers of broadband connections from residences to ISPs' local points of presence. *See Second Advanced Services Report* at ¶ 190.

In a typical configuration, cable customers, to connect to an ISP's point of presence over a cable network, use cable modems installed in their equipment at home to send data signals to a routing device—known as a "Cable Modem Termination System" or "CMTS"—located in the cable operator's "headend" facilities. (A "headend" is a facility within the cable network that receives traditional video programming from satellites and distributes it to customers over the cable network.) These data signals travel over the same wires used by cable operators to deliver video programming. The wires, attached to poles, ducts, conduits, and rights of way, typically run from every home in a cable operator's service area back to a series of headend facilities. At the headend, the CMTS receives the data signals from customers and routes them "upstream" to the ISP's point of presence. The CMTS also transmits data in reverse: it receives data from the Internet (through the ISP's local facility) and sends such data "downstream" to customers' homes. Cable operators allocate the available frequency range on their wires to allow both video programming and broadband data delivery.

In traditional cable service, cable companies supply all of the available programming, with customers merely selecting among programming options compiled by the cable operator (exercising its editorial discretion, subject to legal requirements such as "must carry" laws). In contrast, cable-delivered broadband Internet access allows users to interact with any source connected to the Internet and choose, without

editing by the cable company, the unique information they wish to send or receive. Thus, although most cable operators have been tying their affiliated ISP to their broadband transmission service, customers are free to bypass completely the content provided by the affiliated ISP. As the National Cable Television Association has explained:

> Cable modem service guarantees subscribers an open environment through which they can reach any content available on the World Wide Web. Cable operators do not restrict services that can be provided by online service providers and cable modem service subscribers are able to access other ISPs or online services without having to view the content provided by the cable operator if they so choose. Many cable modem service subscribers use the service to access the proprietary content provided by the Microsoft Network, Yahoo, Amazon.com, and myriad others.

Comments of the National Cable Television Association to the FCC, *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Gen. Docket No. 00-185, at 39 (filed Dec. 1, 2000) (hereafter *NCTA Comments*).

Local telephone companies offer a directly competing broadband access service to connect customers to an ISP's local point of presence. This service is offered over the telephone company's traditional wires—wires that are attached to the same poles, ducts, conduits, and rights of way to which cable operators attach their wires. The service, known as "Digital Subscriber Line" or "DSL" service, uses "specialized electronics at the customer's premises and at a telephone company's central office . . . to transmit high-speed data signals over copper cables." *In re Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and

Order, CC Docket No. 99-295, 15 FCC Rcd 3953, at ¶ 250 (Dec. 22, 1999), *aff'd, AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000). To connect to an ISP's local facility over a DSL network, customers use a transceiver (similar to a cable modem) to send signals to a routing device in the phone company's central office. Those data signals, while carried on the same copper wires used to deliver voice service, use a separate part of the wire's available frequency range so as not to interfere with customers' ability to make telephone calls at the same time they are using DSL service. At the central office, a "Digital Subscriber Line Access Multiplexer" or "DSLAM" performs a function like the CMTS in a cable broadband system: it receives customers' data transmissions and routes them "upstream" to the ISP's point of presence, and it routes transmissions received from the Internet (through the ISP) "downstream" to customers' homes. DSL customers, like cable modem customers, are able to use their broadband connections to transmit data to and from any destination on the Internet.

Thus, regardless of what entity is providing it, residential high-speed Internet access typically requires two separate steps. The first is transmission over a pipeline from a customer's home to an ISP's point of presence, provided by a cable or phone company over wires attached to poles, ducts, conduits, and rights of way. The second is a service delivered by an ISP (whether or not affiliated with the pipeline provider) to provide the connection between the point of presence and the Internet (along with any other services the ISP may wish to provide, such as proprietary content, e-mail accounts, or search tools).

SUMMARY OF ARGUMENT

Contrary to the Eleventh Circuit's conclusion, Section 224 provides for rate regulation of an attachment by a cable

operator of facilities used to provide both cable service and high-speed Internet access. Section 224(b), even if it allows no other rate regulation, provides for rate regulation of the services addressed in the specific subsections addressed to rate regulation, *i.e.*, Sections 224(d) and (e). Under Section 224(e), it is clear that any attachment used to provide a telecommunications service is subject to the rates the Commission has adopted, as required, pursuant to that subsection. High-speed Internet access provided by a cable operator includes a telecommunications service and is therefore covered by Section 224(e) and, hence, by Section 224(b).

Section 224(e) by its terms declares that it covers any attachment used to provide telecommunications services, without any exception for situations in which the provider is a cable operator also using the attachment for cable service. Subsection (d)(3), which contemplates such dual-use attachments, by its language confirms that subsection (e) applies to a cable operator's provision of telecommunications services over dual-use wires. The legislative history, moreover, is explicit in stating precisely such a congressional intent to apply the telecommunications-service rate to such dual-use attachments. And this result is the only one consistent with Congress's intent to ensure nondiscriminatory pole-attachment rates for all providers of telecommunications services. Only applying the more fully compensatory rate of subsection (e), rather than allowing the much less compensatory rate of subsection (d) for one class of telecommunications-service attachments (those also used to provide cable service), fulfills that policy.

Subsection (e) applies when a cable operator uses an attachment to provide customers high-speed Internet access, because it is using the attachment to provide telecommunications services. Whatever else the cable operator is doing, it is serving as a basic transparent conduit

from a user's residence to the ISP point of presence (and the Internet beyond), and that service is a telecommunications service under the express statutory definition. That transparent transport service, moreover, is not a cable service. Indeed, even a cable operator's offering of a traditional ISP's service—the connection from point of presence to the Internet, along with such services as e-mail, home pages, search tools, and the like—is not a cable service. Similarly, when a cable operator offers such a traditional ISP service, that service is an "information service," which, under the FCC's orders, is separate from and additional to the telecommunications service that connects the customer to the ISP. In short, cable-provided high-speed Internet access service includes a telecommunications service, and the dual-use attachments at issue in these cases—because they provide high-speed Internet access—are therefore covered by Section 224(e) and hence Section 224(b).

ARGUMENT

SECTION 224 APPLIES TO REGULATE THE RATE THAT CABLE OPERATORS MUST PAY FOR ATTACHMENTS USED TO PROVIDE BOTH TRADITIONAL CABLE SERVICE AND HIGH-SPEED INTERNET ACCESS

The first question on which this Court has granted certiorari is whether Section 224 applies to regulate the rate charged for pole attachments by cable operators for facilities used for dual purposes—to provide traditional cable services and also to provide high-speed Internet access. The Eleventh Circuit held that such attachments fall outside the particular subsections addressed to rates (*i.e.*, subsections (d) and (e)) and, for that reason, are not subject to Section 224. Pet. App. 26a-32a.[3] Petitioners challenge the Eleventh Circuit decision,

[3] "Pet. App." here refers to the appendix to the Government's petition, in case No. 00-843.

but not by questioning the Eleventh Circuit's conclusion that subsections (d) and (e) are inapplicable. Rather, petitioners skip that question and argue that subsection (b) gives the Commission rate-regulatory authority unconstrained by the scope of subsections (d) or (e) and that this broader subsection (b) authority reaches the dual-use attachments at issue even if they are outside subsection (d) and subsection (e).

Amici instead challenge the Eleventh Circuit on the ground that the Eleventh Circuit erred in concluding that the dual-use attachments fall outside Section 224(e). As this brief shows, the Commission's own orders make clear that high-speed Internet access service by cable operators includes a telecommunications service and thus squarely comes under the rate regime required by and established pursuant to subsection (e). This conclusion requires an affirmative answer to the cable-related question on which this Court has granted certiorari: Section 224(b) covers the dual-use attachments because Section 224(e) does.

Decision on this basis, as shown below, involves a systematic application of the pertinent statutory provisions and definitions, and it takes the structurally more natural approach of asking whether the attachments at issue are within one of the specific subsections that—in contrast to subsection (b), which generically covers "rates, terms, and conditions"—squarely deals with rates. This approach to answering the question presented thus avoids the potentially broader argument of petitioners that subsection (b) provides authority to regulate rates over and above the authority granted in the two subsections specifically addressing rates. (As the Eleventh Circuit pointed out, Pet. App. 30a n.32, no such statutory question was presented by Section 224 before the 1996 amendments, when *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993), was decided.) Petitioners' argument need not be addressed to resolve the cable issue in

these cases or to resolve the wireless-attachment issue (the Commission expressly concluded that Section 224(e) itself applies to wireless attachments, *see* Pet. App. 94a). Decision of the question presented on the ground advanced by *amici*, moreover, would directly further the clear statutory policy: ensuring application of the same subsection (e) rate regime to all providers of telecommunications services.

A. Section 224(e) Applies Whenever An Attachment Is Used To Provide Telecommunications Services, Regardless Of What Other Services It Is Used To Provide

1. The Pole Attachment Act, 47 U.S.C. § 224, requires cable operators to pay the rate established in Section 224(e) when using their attachments to provide a telecommunications service along with cable service. Section 224(e) by its terms states, using the mandatory language of "shall," that the rules promulgated by the Commission under that subsection "shall . . . govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services." § 224(e)(1). By express statutory definition, moreover, a "telecommunications carrier" includes "any provider of telecommunications services." 47 U.S.C. § 153(44). The language of Section 224(e)(1), therefore, by its terms mandates application of the subsection (e) rules to attachments by a cable operator whenever such attachments are used to provide telecommunications services. That clear command makes no exception for an attachment that is also being used to provide cable service.[4]

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[4] An attachment by a cable operator used to provide telecommunications services is clearly covered as a "pole attachment" under Section 224(a)(4) as an "attachment by a . . . provider of telecommunications service" (§ 224(a)(4)) because the cable operator becomes such a provider when providing such services. That is so

The language of Section 224(d)(3) confirms the application of subsection (e) when cable operators use their facilities, in part, to provide telecommunications services. Congress expressly recognized in several places in its 1996 enactment that cable operators would be "engaged in the provision of telecommunications services." 47 U.S.C. § 541(b)(3)(A); *see also* 47 U.S.C. § 522(7) (definition of "cable system," dating back to 1984, that acknowledges possibility of dual-use facilities, partly for cable service and partly for telecommunications services). Congress recognized this reality in Section 224(d)(3) specifically, and in so doing, confirmed the command of Section 224(e)(1) that the telecommunications-services rate applies to dual-use attachments.

Thus, Section 224(d)(3) first provides that the rate established under subsection (d)(1)—which is lower than the telecommunications-service rate of subsection (e), designed to be more equitable and compensatory, as noted below—applies when "any pole attachment [is] used by a cable television system *solely* to provide cable service." § 224(d)(3) (emphasis added). The provision then states that, "[*u*]*ntil* the effective date of the regulations required under subsection (e)"—the regulations governing telecommunications-services attachments, which had to be promulgated by

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irrespective of whether such an attachment also fits within Section 224(a)(4) as an "attachment by a cable television system." § 224(a)(4).

In *Texas Utils. Elec. Co.*, 997 F.2d at 930, the D.C. Circuit noted the awkwardness of the language, "attachment *by* a cable television system," given the usage of "system" elsewhere in the Communications Act to refer to the set of facilities, not the operator of the facilities. 47 U.S.C. § 522(7). That awkwardness was heightened in 1996, when the "cable system" definition as a set of facilities was presumptively extended to the Act as a whole (47 U.S.C. § 153(7), incorporating 47 U.S.C. § 522 definition)) and "provider of telecommunications service" was added to Section 224(a)(4) in syntactic parallel to "cable television system." *See also* § 224(d)(3) (similar parallelism).

February 1998 and take effect in February 2001—the subsection (d) rate "shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier . . . to provide any telecommunications service." § 224(d)(3) (emphasis added). The natural message of these two sentences is straightforward: attachments used *solely* for cable service would continue under the subsection (d) rate, while dual-use attachments would become subject to the subsection (e) rate once the Commission's regulations under that subsection took effect.

2. The intended priority of subsection (e) over subsection (d) for dual-use attachments is made explicit in the relevant legislative history. The two-part rate structure that Congress added to the Pole Attachment Act in 1996 appeared first in the 1995 House bill, though the two parts were presented in the reverse order from the order ultimately adopted: an amended subsection (d) provided first for a rate applicable to "all providers of telecommunications services, including such attachments used by cable television systems to provide telecommunications services," then exempted from that rate "a cable television system that solely provides cable service," such system remaining entitled to the lower pre-amendment rate. H.R. Rep. No. 104-204, Part I, 104th Cong., 1st Sess. 79-81 (1995); *see* 141 Cong. Rec. H8425, H8434 (Aug. 4, 1995) (bill as enacted by House). Dual-use attachments by cable operators were thus expressly subject to the telecommunications-service rate. The committee explanation confirmed the point, stating that if "a company seeks pole attachment for a wire used solely to provide cable television services . . . , that cable company will continue to pay the rate authorized under current law," but if "a cable television system also provides telecommunications services, then that company shall instead pay the pole attachment rate prescribed by the Commission pursuant to the fully allocated cost formula" required for telecommunications-service providers. H.R. Rep. No. 104-204, at 242.

The bill subsequently enacted by the Senate (a significant modification of the Senate committee bill, *see* S. Rep. No. 104-23, 104th Cong., 1st Sess. 40, 86-87 (1995)) contained the same two-part regime as the House bill but changed the order and paragraph structure to address attachments "solely to provide cable service" in a new subsection (d)(3) and "pole attachments by telecommunications carriers" in a new subsection (e). *See* 141 Cong. Rec. H9963-64 (Oct. 12, 1995) (version of S.652 reported to House). The conference committee used the Senate bill as a model, H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 207 (1996), changing (without remark) the Senate's subsection (e) language so that it would refer to "pole attachments used by telecommunications carriers to provide telecommunications services." § 224(e). The conferees said nothing whatever to indicate that they saw any substantive difference between the Senate and House versions with regard to the issue of which rate governed dual-use attachments by cable operators. And, in describing the House version, they expressly reiterated, with no indication of disapproval or departure, the House committee's explanation that if "a cable television system also provides telecommunications [in addition to cable service], then that company shall instead pay the pole attachment rate prescribed by the Commission" for telecommunications-service providers. H.R. Conf. Rep. 104-458, at 206.

3. The same conclusion follows from applying to dual-use attachments the fundamental congressional policy reflected in Section 224—and more generally in the 1996 Act, *see* Point B.1, *infra*—against discriminatory regulatory treatment of competitors based on what facilities they use. Specifically, Congress expressed a purpose in amending the Pole Attachment Act to ensure that cable operators would not have an unfair advantage over local telephone companies and other telecommunications carriers when using their cable networks to provide telecommunications services. Application of

subsection (e) to dual-use attachments is the only statutory construction that preserves, rather than undermines, that policy.

Thus, the rate set in subsection (d) requires a cable company to pay only for a share of total "operating expenses and actual capital costs" represented by the portion of the "usable" space—*e.g.*, the upper portions of a telephone pole—the cable company actually uses. That rate leaves the owner of the pole, duct, conduit, or right of way to pick up the share of costs represented not only by the space it actually uses for its attachments but by the unused portion of the usable space as well. Thus, for example, if the cable company uses one thirteenth of the usable space, the utility retains a twelve-thirteenths share of costs even if its attachments use no more space than the cable company's. *See* Pet. App. 7a & nn.8, 9. Cable operators paying the subsection (d) rate are therefore paying less than their share of total costs for the poles, ducts, conduits, and rights of way they use.

That deficiency is without competitive consequence when cable operators use their attachments "solely to provide cable service" (§ 224(d)(3)), because rivals to cable service (*e.g.*, satellite programming providers) have no directly comparable cost, not using the same poles, ducts, conduits, or rights of way. But when cable operators use their wires to provide telecommunications services in competition with local telephone companies and other telecommunications carriers, they derive a significant advantage from paying only the rate specified in subsection (d). If the poles, ducts, conduits, and rights of way are those of the local telephone company, for example, the subsection (d) rate effectively assigns all the unused share of the usable space to the telephone company, using that lop-sided assignment to allocate the costs. Cable operators have a measurable and unfair advantage in competition for customers of telecommunications services—

not only against the local telephone company but against other non-cable telecommunications-service providers subject to the higher subsection (e) rate, which apportions the full costs of the pole, duct, conduit, or right of way with greater (but not complete) equality among the several users, including the utility. *See* Pet. App. 65a-66a, 97a, 194a-199a; *id.* at 87a (the (e) rate is designedly higher than the (d) rate).

Congress recognized and targeted this discrimination in amending the Pole Attachment Act in 1996. The House Committee explained that the pre-1996 rate (still embodied in subsection (d)) "gives cable companies a more favorable rate for attachment than other telecommunications service providers"—a rate that had been "established to spur the growth of the cable industry, which in 1978 [the year the Pole Attachment Act was enacted] was in its infancy." H.R. Rep. 104-204, at 241. The Committee then added that the creation of a new fully compensatory rate was "intended to remedy the inequity for pole attachments among providers of telecommunications services." *Id.* The Conference Committee, again without indication of disapproval or departure, repeated the House Committee's expression of intent "to remedy the inequity of charges for pole attachments among providers of telecommunications services." H.R. Conf. Rep. No. 104-458, at 206. This is the precise inequity that would be created if one among the several providers of telecommunications services were treated more favorably just because it also was providing a cable service (where competitors do not have a higher share of the costs of using the very same poles, ducts, conduits, or rights of way). The congressional policy, as well as the statutory language and specific congressional intent, thus mandates application of subsection (e) to a cable operator's dual-use attachments.

B. Cable-Delivered High-Speed Internet Access Includes The Provision Of A Telecommunications Service

The Communications Act sharply distinguishes three categories of services provided by wire: telecommunications services, cable services, and information services. *See* 47 U.S.C. § 153(7) (cable service), (20) (information service), (43) (telecommunications), (46) (telecommunications service); *see also* 47 U.S.C. § 541(b) (distinguishing cable service from telecommunications services); *In re Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45, 13 FCC Rcd 11,830, at ¶ 39 (Apr. 10, 1998) (explaining that "telecommunications services" and "information services" are "mutually exclusive") ["*FCC Report to Congress*"]. The Commission's orders applying these statutory definitions compel the conclusion that a cable operator's offering of high-speed Internet access includes a separate "telecommunications service" and, at a minimum, is not solely a "cable service" or "information service." Accordingly, Section 224(e) applies to the dual-use attachments at issue in these cases.

1. The Communications Act defines a "telecommunications service" as a service, offered "for a fee directly to the public," and "regardless of the facilities used," that provides "transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and received." 47 U.S.C. §§ 153(43) & (46). Telephone service is the archetypal example of a telecommunications service because it allows users to direct unedited voice communications to other individuals. Cable operators are providing just such a service when they provide customers—members of the public served for a fee—high-speed Internet access, which includes unedited transport of information between the customers' homes and an ISP's point of presence (which in turn connects the customers to the Internet).

Thus, once the cable operator connects customers to their ISPs, the cable operator does no selection of the information transported between the customers' homes and the ISPs' facilities. Customers are in complete control of the information sent and received over the wires connecting their homes, through poles, ducts, conduits, and rights of way, with the ISPs and the Internet beyond. Cable operators transport information "of the user's choosing" when delivering e-mail, for example, or conveying data that a user sends to or receives from an Internet site (through the ISPs' facilities)—when reading judicial opinions on-line, purchasing a book on Amazon.com, bidding in an electronic auction on eBay, or participating in a chat-room discussion hosted by America Online. As the National Cable Television Association has explained, "[c]able modem service guarantees subscribers an open environment through which they can reach any content available on the World Wide Web." *NCTA Comments* at 39.

The FCC's own precedents compel the conclusion that cable operators are offering a telecommunications service when they provide high-speed Internet access over their cable wires. The FCC has repeatedly concluded that DSL service is a telecommunications service. *See In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Remand, CC Docket No. 98-147, 15 FCC Rcd 385, at ¶ 9 (Dec. 23, 1999) ("we reaffirm our prior conclusion that xDSL-based advanced services constitute telecommunications services"); *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, CC Docket No. 98-147, 13 FCC Rcd 24,012, at ¶ 36 (Aug. 7, 1998) [*Advanced Services Order*] (telephone companies are offering "a variety of services in which they use xDSL technology . . . to provide members of the public with a transparent, unenhanced transmission path"); *see also AT&T Corp. v. City of Portland*, 216 F.3d 871, 879 (9th Cir. 2000) ("the FCC regulates DSL service, a high-speed competitor to cable broadband, as an

advanced telecommunications service subject to common carrier obligations"). Cable-delivered high-speed Internet access includes a transparent high-speed transport service that directly competes with and is functionally indistinguishable from DSL service. As the FCC has stated, "if the same type of Internet access service is offered over cable systems as well as telephone networks, it is not readily apparent why the classification of the service should vary with the facilities used to provide the service." Brief of the FCC as *Amicus Curiae*, *City of Portland*, 2000 U.S. App. LEXIS 14383, at 25 (9th Cir.; filed Aug. 16, 1999).

Under the statutory definitions, it makes no difference whether the service uses coaxial cable, optical fiber, or copper wire. The Communications Act definition of "telecommunications service" expressly states that the term applies "regardless of the facilities used." 47 U.S.C. § 153(46). The FCC, for its part, has recognized "Congress's direction that the classification of a provider should not depend on the type of facilities used," adding: a "telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable, satellite, or some other infrastructure." *FCC Report to Congress* at ¶ 59. That conclusion is reinforced by the medium-neutrality policy embodied in the specific statutory provision promoting the deployment of "advanced telecommunications capability" (Telecommunications Act of 1996, § 706, 110 Stat. 153; 47 U.S.C. § 157 note), which is expressly defined "*without regard to any transmission media or technology*, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications *using any technology*." *Id.* § 706(c)(1) (emphasis added). Cable-offered high-speed Internet access service, like DSL service, is an example of such advanced services. *See Second Advanced Services Report* at ¶ 18.

The Telecommunications Act's repeated policy of neutrality among Internet access technologies thus requires classification of cable-delivered high-speed Internet access as a "telecommunications service." Because DSL and cable broadband services are competitively indistinguishable, and because the Act admits no distinction based on the facilities used, cable-delivered broadband *a fortiori* constitutes a telecommunications service. The Ninth Circuit recently confirmed this conclusion, holding that cable operators, by offering their subscribers "Internet transmission over [a] cable broadband facility," are "providing a telecommunications service as defined in the Communications Act." *City of Portland*, 216 F.3d at 878; *see also id.* ("The Communications Act includes cable broadband transmission as one of the 'telecommunications services' a cable operator may provide over its cable system.").

2. Cable operators offering high-speed Internet access are not offering what is "solely" a "cable service." § 224(d)(3). The Communications Act defines a "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6); *see* 47 U.S.C. § 153(7) (adopting Section 522(6) definition for Communications Act as a whole). Whatever that definition could encompass, it plainly cannot encompass the transparent transport service connecting a customer to an ISP of the customers' own choosing, without editorial interference by the cable operator. That service does not involve the cable operator's "programming" at all. For that reason alone, cable-offered high-speed Internet access service is, at a minimum, not "solely" a cable service.

Although that is enough to render Section 224(d) inapplicable, it is also clear that, even when the ISP service itself is considered, cable-delivered high-speed Internet

access is not "cable service." ISP service is in no way limited to "video programming," which encompasses only "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(20). As the FCC has concluded, "Internet access service generally consists of numerous distinct and related elements, such as access to personal, educational, informational, and commercial web sites; the ability to send and receive electronic mail; access to streamed video content; Internet video messaging and conferencing; and a host of other services both realized and forthcoming." *In re Internet Ventures, Inc.*, Memorandum Opinion and Order, File No. CSR-5407-L, 15 FCC Rcd 3247, at ¶13 (Feb. 18, 2000). ISP service, with its numerous services in no way "comparable" to traditional video programming, falls outside the definition of "video programming . . . contemplated by . . . the Communications Act." *Id.* ¶ 12.

Nor can the ISP-service part of high-speed Internet access over cable facilities constitute an "other programming service," which is limited to "information that a cable operator makes available to all subscribers generally." 47 U.S.C. § 522(14). Cable operators, insofar as they provide access to the Internet, enable their broadband customers to acquire a wide range of information that is not "available to all subscribers generally." A cable broadband customer is able to access e-mail that is written for, and delivered to, that customer alone. Such a customer is free to create and access a unique home page on a "portal" such as Yahoo!—a page that includes content organized in a format dictated and seen exclusively by that customer. A cable broadband customer can establish a specific identity with electronic merchants, such as Amazon.com, and as a result receive personalized content when accessing such merchant sites. In at least these ways, cable-delivered broadband access provides each customer exclusive use of personal information that the cable

operator does not make available to all of its subscribers. And such access is plainly not limited to "one-way" transmission, as the "cable service" definition requires. 47 U.S.C. § 522(6)(A). The Ninth Circuit summarized these basic differences:

> Internet access is not one-way and general, but interactive and individual beyond the "subscriber interaction" contemplated by the statute. Accessing Web pages, navigating the Web's hypertext links, corresponding via e-mail, and participating in live chat groups involve two-way communication unmatched by the act of electing to receive a one way transmission of cable or pay-per-view television programming.

City of Portland, 216 F.3d at 876. The two-way interactivity and customizing made inherent in use of the Internet disqualifies ISP service from being "cable service."[5] *See* Pet. App. 28a-29a.

In addition, the requirement that it is the cable operator who must be engaged in the "transmission" of a "programming service," along with the "subscriber interaction" needed to select or use such programming, takes ISP service—not *all* services providing information, but *Internet*-access service—outside the definition of "cable service." Before the 1996 Act, in *National Cable Television Ass'n v. FCC*, 33 F.3d 66 (D.C. Cir. 1994), the D.C. Circuit, relying on the "transmission" language as it had long been used in the cable provisions, upheld the Commission's interpretation of "cable service" as *not* covering a

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[5] *See* H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 41-42 (1984) ("[T]he definition of other programming service . . . may not include information that is subscriber-specific. If information transmitted on a cable system is made available only to an individual subscriber . . . , the transmission of this information is not a cable service."); *id.* at 42 ("All services offered by a cable system that go beyond providing generally-available video programming or other programming are not cable services.").

"transparent conduit" for content—even traditional video content—that is selected by an end user and that is originated by a third party, not by the cable operator. *Id.* at 71; *see id.* at 71-72 (going beyond deference to Commission, citing "[c]ommon usage," and concluding that it is "obvious" that "'transmitting' a video signal implies at least choosing the signal, or originating it"). Congress, in amending the definition of "cable service" in 1996, did nothing to alter that interpretation.[6] An ISP service by cable operators—insofar as it provides transparent unedited access to the Internet (rather than its own proprietary content)—is not a "cable service" for that reason.

3. Finally, cable-delivered high-speed Internet access does not fall within the Communications Act's definition of an "information service": "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20). Cable operators, of course, like DSL-providing telephone companies, may offer customers an ISP service, which is an "information service." *See FCC Report to Congress* at ¶¶ 33-52, 66. But they provide that service *along with* their telecommunications service, and, as the Commission's orders establish, the two services are statutorily distinct and cannot be conflated. The

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[6] The 1996 conferees stated that, by adding the words "or use" to the definition of "cable service," they intended to bring in *at least some* "interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services" [the pre-1996 Commission-used name for what are now called "information services"]. H.R. Conf. Rep. 104-458 at 169. Even that statement (still less the statutory text) does not extend "cable service" to *all* information services, including ISP service providing access to (customized) content created and controlled by the end user and third parties, without interference by the cable operator. The conferees' statement is fully meaningful as a reference to proprietary content provided entirely by the cable operator.

Commission concluded when classifying DSL as a "telecommunications service": an "end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately: the first service is a telecommunications service (*e.g.*, the enhanced xDSL-enabled transmission path), and the second service is an information service, in this case Internet access." *Advanced Services Order* at ¶ 36. So, too, customers of cable operators, which have configured their cable Internet service to allow bypassing of the content and services offered by their affiliated ISPs, receive, at the least, a "transparent, unenhanced, transmission path" to independent ISPs. *Id.* The Eleventh Circuit's cursory analysis of this issue breaks down precisely because, in speaking simply of "Internet service" (Pet. App. 26a, 31a), it fails to differentiate between the two components of cable Internet service—a telecommunications service delivered over wires attached to poles, ducts, conduits, and rights of way, and an information service provided by the cable operator's affiliated Internet service provider.

The Ninth Circuit's analysis in *City of Portland* confirms the FCC precedents. As the Ninth Circuit concluded, cable modem service "consists of two elements: a 'pipeline' . . . and the Internet service transmitted through that pipeline." *City of Portland*, 216 F.3d at 878. To the extent that a cable operator makes available the service of an affiliated or exclusive ISP, "its activities are that of an information service. However, to the extent that" a cable operator provides its "subscribers Internet transmission over [a] cable broadband facility," it is "providing a telecommunications service as defined in the Communications Act." *Id.*

In short, even if cable broadband customers are compelled by the cable operator to pay for the affiliated ISP, they are also purchasing a telecommunications service. The dual-use

attachments used to provide that telecommunications service are covered by Section 224(e). They are, accordingly, subject to the rate-regulatory authority of the Commission under Section 224(b).

CONCLUSION

The judgment of the court of appeals should be reversed on the ground that Section 224(e) covers attachments used to provide both cable service and high-speed Internet access.

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